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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. A-786

WILLIAM DEL TORO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	3
Statement of the Case	3
REASONS FOR ALLOWANCE OF WRIT:	
I. Inasmuch as the conviction on the bribery counts was reversed by reason of the holding that the potential recipient was not a federal official, petitioner could not properly be convicted of conspiracy and perjury with respect to dealings with that person	4
II. The reception into evidence of the admissions of the codefendant, who did not testify, and of the taped conversations with the potential bribe recipient, was reversible error as to petitioner.	6
III. The evidence established petitioner's defense of entrapment;	8
IV. Ambiguous answers may not be made the basis for a perjury prosecution.	10
V. It was error for the instructions not to include an adequate discussion of the exculpatory statements and circumstances affecting petitioner..	11
Conclusion	13
APPENDIX - Opinion of the United States Court of Appeals for the Second Circuit	A-1

Cases Cited

	Page
Brown v. United States, 245 F.2d 549..	10
Bruton v. United States, 391 U.S.123..	7
Commonwealth v. Giles, 353 Mass. 1....	11
Krulewitch v. United States, 336 U.S.440	7, 8
Sherman v. United States, 356 U.S.369..	9
Sorrells v. United States, 387 U.S.435.	9
United States v. Diago, 320 F.2d 898...	11
United States v. Musgrave, 444 F.2d755.	12
United States v. Percivault,490 F.2d126	7
United States v. Russell, 411 U.S.423..	9
United States v. Thayer, 214 F.S.929...	10
U.S.ex rel. Rice v. Vincent, 491 F.2d 1326	7
United States v. Watson, 489 F.2d 504..	10
Williams v. United States, 93 F.2d 685.	12

Statutes Cited

18 U. S. Code Sec. 201-b-2.....	2,3
18 U. S. Code Sec. 371	1,3
18 U. S. Code Sec. 1623	1,3
28 U. S. Code Sec. 1254	2

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner William Del Toro respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, rendered on February 27, 1975, to the extent that it affirmed a judgment of the United States District Court for the Southern District of New York, convicting petitioner of conspiracy (18 U. S. Code Sec. 371) and perjury (18 U. S. Code Sec. 1623). The same judgment reversed a conviction

on two bribery counts (18 U. S. Code Sec. 201-b-2). Petitioner was sentenced to concurrent terms of a year and a day on each count. Enforcement of the mandate was successively stayed by the United States Court of Appeals both during the pendency of the appeal in that Court and pending the outcome of the present application for a writ of certiorari.

Opinion Below

An opinion, a copy of which is appended hereto, was rendered by the Court of Appeals, and has not yet been reported.

Jurisdiction

The judgment of the aforesaid Court of Appeals was rendered and entered on February 27, 1975. The time to file the present petition was duly extended by Mr. Justice Marshall to and including April 28, 1975.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254. The basis for federal jurisdiction in the United States District Court was the provisions of 18 U. S. Code Secs.

371, 201-b-2 and 1623.

Questions Presented for Review

1. In view of the reversal of the bribery counts by reason of the holding that the potential recipient was not a federal official, could petitioner properly be convicted of conspiracy and perjury with respect to dealings with that person?

2. Was the use of the admissions of the codefendant, who did not testify on the trial, and his taped conversations with the potential bribe recipient, a prejudicial violation of petitioner's rights?

3. Did the evidence establish petitioner's defense of entrapment?

4. May ambiguous answers be made the basis of a perjury conviction?

5. Was it error for the charge not to include an adequate discussion of exculpatory statements and circumstances affecting petitioner?

Statement of the Case

The petitioner and one Kaufman were convicted

of conspiracy, bribery and perjury after a two-week trial before Knapp, D.J., and a jury. The indictment charged the defendants (and a third party, one Ruocco, who had pleaded guilty) with conspiracy to defraud the United States by bribing a public official, with bribery and with perjury. Petitioner was found guilty of conspiracy, bribery and five counts of perjury; he was acquitted on a sixth count of perjury and a seventh was dismissed at the close of the case. Various details of the evidence are discussed in the appended opinion of the Court of Appeals, and will not be repeated herein.

REASONS FOR ALLOWANCE OF WRIT

I

Inasmuch as the conviction on the bribery counts was reversed by reason of the holding that the potential recipient was not a federal official, petitioner could not properly be convicted of conspiracy and perjury with respect to dealings with that person.

It is manifest that the gravamen of the charges against petitioner and the other defendants was the alleged bribery of a federal official. The claimed conspiracy related to activities of that character, and the perjury sought to be proved likewise dealt with testimony as to those transactions, actual or contemplated. It is a fair inference that without the prosecution's attack on the bribery element, there never would have been any prosecution for conspiracy or perjury. The Solicitor General's consideration of applying for certiorari supports this contention. The alleged conspiracy had to be an improper agreement to commit a crime against the United States, while the alleged perjury had to be predicated upon false statements with respect to such a crime. Once the Court of Appeals concluded that the status of the contemplated bribe receiver was not that of a federal official within the scope of the statute, it became a legal impossibility to conspire to do things violative of no federal statute, and likewise any sworn testimony regarding

the situation lacked the element of materiality essential to constitute perjury.

It is therefore submitted that the reversal of the bribery conviction rendered it mandatory that the convictions of conspiracy and perjury likewise fall. A ruling on this significant point involves an important point of law which has not previously been the subject of authoritative appellate ruling.

II

The reception into evidence of the admissions of the codefendant, who did not testify, and of his taped conversations with the potential bribe recipient, was reversible error as to petitioner.

A portion of the government's case consisted of the reading of codefendant Kaufman's grand jury testimony. This necessarily involved petitioner, especially in the recantation. Although the Court of Appeals remarked that there was no transcript reference to petitioner herein, attention is directed specifically to the three

tapes of conversations between Kaufman and Morales of October 9, 26 and 30, 1972. Since Kaufman did not testify on the trial, petitioner was unable to cross-examine him; and it is obvious that the trial jury could not avoid being influenced by those statements in assessing the possible guilt of petitioner.

The foregoing procedure was clearly violative of petitioner's rights to confrontation secured by the Sixth Amendment. Krulewitch v. United States, 336 U. S. 440; Bruton v. United States, 391 U. S. 123. In the seven years since the latter decision it has been cited in federal reported cases more than three hundred times, including recent holdings in the Second Circuit (United States v. Percivault, 490 F. 2d 126, and United States ex rel. Rice v. Vincent, 491 F. 2d 1326). In Bruton, supra, admissions of a codefendant who did not testify implicated the appellant and were held by this Court to constitute reversible error. It was ruled that there was substantial risk that the jury, notwithstanding

instructions to the contrary, might on a joint trial consider the incriminating statements of the accomplice in determining the appellant's guilt, and that this violated the right of confrontation, Mr. Justice Brennan declaring:

> "The unreliability of such evidence is compounded when the alleged accomplice, as here, does not testify, and cannot be tested by cross-examination."

Furthermore, the courts have consistently rejected "the naive assumption that prejudicial effects can be overcome by instructions to the jury." Krulewitch, supra.

III

The evidence established petitioner's defense of entrapment.

Although the Court of Appeals (footnote 10) rejected the defense of entrapment as being frivolous, it is submitted that elsewhere in the opinion (p. 5, first paragraph) the facts described show a clear procedure whereby Morales, admittedly aiding the prosecution, sought to induce the commission of crimes by petitioner. The tapes in evidence are replete with instances

of such a course. We refer to Exhibits 4 and 5 (pp. 27, 28, 30, 34, 36; and pp. 77-78). Thus Morales says to petitioner:

> "Come on, man ... That's the reason I'm coming to you... You know I'm going to take care of you."

Petitioner's reaction is significant:

> "No, no, no, no. I don't want to be involved."

A colloquy like the following is a fair sample:

> Morales: "And you don't want to help me. You're a son of a bitch. Damn it..."
>
> Petitioner: "I understand, but it cannot be done..."
>
> Morales: "You're gonna get some piece of the action."
>
> Petitioner: "Not me, I don't have nothing to do with nothing. You know that."

Such a situation eminently calls for the application of the rules on entrapment, as recently considered by this Court in United States v. Russell, 411 U. S. 423, following the previous holdings in Sorrells v. United States, 287 U. S. 435, and Sherman v. United States, 356 U. S. 369. The basic inquiry continues to be

whether the criminal design was deliberately implanted or promoted in the mind of an innocent person in order that he might be prosecuted. See United States v. Watson, 489 F. 2d 504.

The entrapment defense is equally applicable to the conspiracy and to the substantive crimes charged. Logically, it is especially germane to the perjury. With the government having possession of tapes of a person's conversations, it is manifest that his use as a pretended witness before a grand jury is simply a device or pretext to have him incriminate himself so as to render him liable to prosecution for perjury. See United States v. Thayer, 214 F. S. 929, and Brown v. United States, 245 F. 2d 549.

IV

Ambiguous answers may not be made the basis for a perjury prosecution.

As appears from the record (p.1530), the trial court instructed the jury that they could convict of perjury if the answers given were ambiguous or even true, so long as there was an intent to deceive.

However, the law will not sustain a perjury conviction based on ambiguous testimony. Commonwealth v. Giles, 353 Mass. 1, 228 N. E. 2d 70; United States v. Diago, 320 F. 2d 898, 907.

The very indictment herein, in charging perjury, abounds in answers of an ambiguous character, such as "I don't think so ... I don't remember that kind of a conversation" (count 4); "I don't recall it ... It may be possible that I had a conversation something like that" (count 5)--and many others. Accordingly, it was of paramount importance that the trial court should have excluded ambiguous testimony as a possible foundation for a perjury conviction.

V

It was error for the instructions not to include an adequate discussion of the exculpatory statements and circumstances affecting petitioner.

In the review of the evidence relating to conspiracy and bribery (1515-1525), the references to petitioner's alleged participation made only casual mention of his claim "in essence that all he intended to do was to get Morales off his back" (1518).

The tenor of the language in effect gives little or no force to the tapes, in the course of which petitioner, while obviously unaware of the recording procedure, repeatedly negatived any participation, whether in conspiracy or intent to bribe. The error was compounded in the assumption of an alleged conspiracy in August, 1972, despite evidence dealing with events four or five months later. Due exception was taken to the foregoing (1533).

The law is well established that a trial judge's summary of the evidence for the enlightenment of the jury must be fair, adequate and not one-sided. Williams v. United States, 93 F. 2d 685. The instructions must sedulously maintain a judicial attitude of complete impartiality. United States v. Musgrave, 444 F. 2d 755.

The charge's deficiency in the foregoing regard becomes especially significant when it is noted that upon the motions for judgment of acquittal the judge expressed his own doubts as to the sufficiency of the evidence to establish the guilt of petitioner.

Conclusion

The case is one wherein petitioner has been unjustly convicted. The present application presents meritorious and certainly arguable questions on subjects likely to arise in other cases and of a character calling for authoritative disposition. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals in so far as it affirms the judgment of the United States District Court may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y., April 22, 1975.

JACOB W. FRIEDMAN,
Attorney for Petitioner

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 395, 396 -- September Term 1974

Argued November 15, 1974

Decided February 27, 1975

Docket Nos. 74-2021, 74-2035

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DEL TORO
and WILLIAM KAUFMAN,

Defendants-Appellants.

Appellants were convicted by a jury before Hon. Whitman Knapp, United States District Judge for the Southern District of New York of the crimes of bribing a federal public official in violation of 18 U.S.C. § 201, of conspiracy to defraud the United States of its lawful functions in violation of 18 U.S.C. § 371, and of several counts respectively of making false declarations in violation of 18 U.S.C. § 1623. The Court of Appeals held, Gurfein, Circuit Judge, that the person "bribed," an employee of New York City, was not a federal "public official"

within the meaning of Section 201 and that the conviction on the substantive counts must be reversed. The Court held further that a conspiracy to defraud the United States was proved, and that the contention of appellant Kaufman that he was improperly convicted of the crime of making a false declaration because of his alleged recantation is rejected and the false declaration convictions, as well as the conspiracy conviction, are affirmed.

JACOB W. FRIEDMAN, New York, N.Y. (MARC HERMELIN, New York, N.Y., on the brief), for Defendant-Appellant DEL TORO.

HAROLD BAER, JR., New York, N.Y. (GUGGENHEIMER & UNTERMYER, JAMES V. MORGAN, and BRUCE J. BERMAN, New York, N.Y., of counsel), for Defendant-Appellant KAUFMAN.

EDWARD J. KURIANSKY, Assistant United States Attorney, Southern District of New York (PAUL J. CURRAN, United States Attorney, and JOHN P. FLANNERY, II, LAWRENCE S. FELD, and JOHN D. GORDAN III, Assistant United States Attorneys, Southern District of New York, of counsel), for Appellee UNITED STATES OF AMERICA

Before FRIENDLY, FEINBERG and GURFEIN, Circuit Judges.

GURFEIN, Circuit Judge:

Appellants William Del Toro and William Kaufman were convicted of conspiracy, bribery and perjury after a two week trial before Judge Knapp and a jury. They challenge their conviction on several grounds in this appeal. We affirm in part and reverse in part.

The indictment charged appellants and a third defendant, Ralph Ruocco,[1] with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and with bribing a public official, in violation of 18 U.S.C. §§ 201(b) and 2. In addition, each individual defendant was charged with several counts of perjury, in violation of 18 U.S.C. § 1623.

The jury found Kaufman guilty of conspirary, bribery and on three counts of perjury. Three other counts had been dismissed by the court before trial on the ground that Kaufman had effectively recanted his false testimony within the terms of 18 U.S.C. § 1623(d) during his testimony before the Grand Jury. He was sentenced to concurrent terms of four years on each count.

The jury found Del Toro guilty of conspiracy, bribery and on five counts of perjury. He was acquitted on a sixth count of perjury; a seventh had been dismissed at the close of all the evidence. He was sentenced by Judge Knapp to concurrent terms of a year and one day on each count.

Evidence introduced by the Government allowed the jury to find that Del Toro and Kaufman had conspired to bribe Pedro Morales, Assistant Administrator of the

Harlem-East Harlem Model Cities Program. Kaufman, a lawyer and a real estate broker, hoped that Morales would use his official position to secure for Kaufman a lease by Model Cities of significant office space in one of the buildings for which Kaufman was the renting agent. The benefit to Kaufman would be a lucrative commission. Del Toro, the Executive Director of an East Harlem anti-poverty agency, Massive Economic Neighborhood Development, Inc. (MEND), acted as a middle man in the transaction.

The first meeting between Kaufman and Morales occurred during late August, 1972, as a result of a chance conversation between Del Toro and Morales in Morales' office. Morales mentioned to Del Toro that he had been charged with the duty of finding office space for a new branch of Model Cities. Del Toro stated that space was available in the Ludwig-Baumann building, where MEND offices had previously been located, and that he knew Kaufman, the rental agent. Several days later, Del Toro telephoned Morales to say that Kaufman was at the MEND offices. Morales joined Del Toro at MEND offices, met Kaufman, and discussed the possibilities of leasing office space with both men. At one point, Morales told Kaufman that to secure the lease, Kaufman would have to pay a 10 per cent commission as a bribe. Kaufman indicated that he knew he might have to pay a bribe and would think it over.

On September 1 Morales was arrested by the United States Attorney's Office on charges of conspiracy and receipt of bribes relating to a different matter, a Model Cities summer camp program. Morales admitted his complicity and agreed to assist in a joint federal-city undercover investigation into

official corruption in the Model Cities Administration. Thereafter, Morales, while retaining his job with Model Cities, aided investigators by tape recording conversations with various individuals who continued to perceive him as a corrupt administrator. Among those individuals were Kaufman and Del Toro.

On September 20 Kaufman dropped in at Morales' office at a time, when, by chance, Morales happened to be wearing concealed recording equipment in connection with another investigation. Morales recorded his conversation with Kaufman, in which the two discussed the possibility of the renting of space in the Ludwig-Baumann Building by Model Cities. Kaufman assured Morales that a mutually lucrative deal could be worked out in detail. When Morales stated that his superior would want money "up front," Kaufman stated that he usually operated on trust with people, but he did not refuse out of hand to supply front money. Kaufman also noted that they would have to build up a business record of their transaction to conceal the payoff.

On October 26 Morales recorded a conversation with Del Toro in which Del Toro offered to help Morales come to an agreement with Kaufman, who had not gotten in touch with Morales since their September 20 meeting.

On October 30 Morales met with Kaufman at Del Toro's office, as Del Toro had arranged, and the conversation was recorded. Del Toro was not present. Kaufman told Morales that the owners of the building had agreed to pay Morales $15,000 if he could arrange for Model Cities to rent the space

and that the payoff would be disguised as a part of Kaufman's commission agreement. Kaufman would make his payment to Morales once the commission had been paid to Kaufman. In response to Morales' expressed fears of a double-cross, Kaufman stated that he would not jeopardize his continuing good relationship with the City personnel by deceiving Morales.

Thereafter, Morales had a series of meetings both with Del Toro and Kaufman which were recorded. In such meetings, Del Toro demonstrated specific knowledge of the transactions between Kaufman and Morales and urged Morales to trust Kaufman. He also agreed to help Morales secure front money from Kaufman. In meetings with Kaufman, Kaufman assured Morales that money would be forthcoming once serious negotiations on the lease had begun.

In the meantime, Kaufman had informed Ralph Ruocco, assistant to the President of Acme-Hamilton, the New Jersey corporation which owned the Ludwig-Baumann Building, that it might be necessary to bribe Model Cities officials in order to secure the lease. On November 14 Kaufman nad Ruocco, on behalf of Acme-Hamilton, signed a commission agreement which included inflated percentage payments to Kaufman, out of which he would make payments to the officials. In January, Kaufman succeeded in getting a check for $500 from Ruocco, who had purportedly gotten approval from his superior, the President of Acme-Hamilton. On January 26 at a prearranged meeting, Kaufman paid the $500 in cash to Morales and urged him to press forward with arrangements for the lease. Kaufman later told Ruocco that the money had been paid to Morales.

The perjury counts against Kaufman

On February 2, 1973, Kaufman appeared before the Grand Jury, where he was advised of his constitutional rights and of the fact that he was a target of their investigation. After having denied complicity in any corrupt activities, Kaufman was shown boxes of tape recordings. He then admitted that Morales had asked him for money, but denied offering or paying any bribes.

Thereafter, Kaufman met with the Assistant United States Attorney conducting the grand jury investigation, who reminded him of his constitutional rights and then read to him the perjury statute, drawing his attention to the recantation provision and to the proviso that a recantation can no longer be made once the perjury has become manifest. The Assistant then told Kaufman about the tapes of his conversations with Morales, after which Kaufman admitted offering a bribe to Morales. He continued to deny that he actually paid the $500.

The Assistant and Kaufman then entered into an exchange in which Kaufman indicated that he would be willing to tape conversations with officials of Acme-Hamilton in return for a deal with the Government. Denied his request for full immunity, and informed that he would have to plead guilty to a felony, Kaufman decided to consult an attorney.

On February 6 Kaufman and his lawyer met with the Assistant and, after some discussion, Kaufman agreed to cooperate with the Government and to plead guilty either to conspiracy or to perjury. He

now admitted paying the $500 to Morales and revealed his discussions and arrangements with Ruocco. During the subsequent brief period of cooperation, Kaufman himself tape recorded two conversations with Ruocco, in which Ruocco indicated his knowledge of the bribery transactions and implicated his superiors at Acme-Hamilton. Kaufman was twice called to appear before the Grand Jury thereafter to adjourn his subpoena, but he did not testify.

On February 16 Kaufman again asked for full immunity or for a chance to plead to a gratuity count in return for his continued cooperation. Informed that this arrangement would be impossible, Kaufman withdrew from his agreement to cooperate with the Government. He appeared once more before the Grand Jury, bur failed to testify further on advice of counsel. Kaufman also warned Ruocco by telephone that they were under investigation, and suggested that they meet to work out a coherent story.

Del Toro Perjury

In the meantime, Del Toro had appeared before the Grand Jury on February 16, where, after being informed of his rights and of the fact that he was a target of the investigation, he denied knowing of any offer or payment to Morales and participating in any way in the transaction. He admitted only that he thought Model Cities would be paying Kaufman a brokerage fee and that he was aware that payoffs were not uncommon among public officials. In a second appearance before the Grand Jury on February 23, Del Toro declined to change his earlier testimony. He did admit that

he had introduced Kaufman and Morales and had been present at their first meeting, but claimed he had been in a different part of the room when they talked.

I

Both appellants contend that their convictions on the substantive counts, two and three, for violation of 18 U.S.C. §§ 201 (b)2 cannot stand, and that their conviction on the conspiracy count, count 1, must also be reversed. We agree with their contention on the substantive counts. We disagree with respect to the conspiracy count.

18 U.S.C. § 201(b)(1) provides that whoever gives or promises anything of value to any "public official" with intent to influence any official act is subject to fine and imprisonment. Kaufman and Del Toro were convicted under § 201(b).[2/]

"Public official" is defined in Section 201(a), in pertinent part, as an "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government."

"Official Act" is there defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

Appellants raise the point that

Morales, who was a city employee, was not a "public official" nor capable of performing an "official act" within the meaning of the statute.

The trial judge had some reasoned hesitation on the point but concluded that "a close legal question ought to be decided in favor of the Government so it can be revoewed." He accordingly denied the defense motions to dismiss, and charged the jury as follows. After telling the jury that in order to convict they must find that Kaufman promised Morales $15,000 and that "the purpose of the promise was to influence him, Morales, in an official act, namely, to induce him to make a favorable recommendation that would induce Model Cities to lease the Ludwig-Baumann Building," he proceeded to explain the third element of the offense "that Morales was a public official."

On this, the trial judge charged as follows:

> "Official, of course, means an official of the United States. We have no jurisdiction in this Court over the bribery of any other officials. That in turn has been defined by statute as one who is acting for or on behalf of the United States or any agency thereof.
>
> "Now, you have heard the testimony of Mr. Torres to the general effect that the United States government had determined to implement certain of its social and government objectives by financing certain state or city

> agencies, one of which was Model Cities, of which Mr. Morales was a duputy director. You will recollect what Mr. Torres said about the extent to which the United States through HUD, Housing and Urban Development, supervised Model Cities' activities and that the United States paid 100% of the cost of Model Cities' program and 80% of its salaries including, of course, Mr. Morales'.
>
> "The salaries were actually paid by the city but through monies advanced by the government, according to Mr. Torres' testimony. On the basis of such testimony you may conclude that Mr. Morales was: 'Acting for or on behalf of the United States or an agency thereof,' and that he was a public official within the meaning of the statute."

The jury was permitted to convict on the substantive counts on the theory that, although Morales was a city employee, he could be found to be a federal "public official" because the federal government financed certain city agencies like Model Cities by paying 100% of the cost of its program and 80% of its salaries through a grant to the City, and because HUD supervised Model Cities' activities to some extent.

In view of the enormous amount of funding by the Federal Government on a broad spectrum which includes welfare, housing and health, we are constrained to take a close

look at the determination below and the effect of bringing clearly illegal conduct under state law within the ambit of the federal jurisdiction.

It seems to us that a healthy regard for the federal system of divided powers, as well as for the still accepted doctrine that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Reivis v. United States, 401 U.S. 808, 812 (1971), compels a close scrutiny. In discerning Congressional intent we may consider whether an expansive interpretation of the statute "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." Reivis, supra, 401 U.S. at 812.

Turning to the question of ambiguity, we write on a comparatively clean slate, for there are no decisions holding city employees like Morales to be federal "public officials." Cases cited to this point by the Government are inapposite.

In United States v. Levine, 219 F.2d 745 (2 Cir. 1942) the Market Administrator was appointed directly by the Secretary of Agriculture, and in turn appointed the defendant who was bribed to use his influence to stave off investigations under the federal statute. In Harlow v. United States, 301 F.2d 361, 370 (5 Cir. 1962) the post exchanges were themselves direct instrumentalities of the United States and its employees were "acting for the United States."

Cases cited under the federal fraud statutes are different because they

involved obtaining federal funds by fraudulent means, see United States ex rel. Marcus v. Hess, 317 U.S. 537; United States v. Candella, 487 F.2d 1223 (2 Cir. 1973), cert. denied, 415 U.S. 977 (1974), a direct injury to the federal government.

Our first inquiry then is whether Section 201 on its face takes in a person in the status of Morales as a federal "public official." The Government relies on the phrase "acting for or on behalf of the United States in any official function." It places no emphasis on the modifying phrase "under or by authority of any such department, agency or branch of Government."

We do not believe that Morales was acting "under or by authority of any such department, agency or branch" of the federal government. He was a city employee, carrying out a task delegated to him by his superior, another city employee. If his superior had accepted Morales' recommendation, the decision to move Model Cities' offices to the Ludwig-Baumann Building would still have had to be passed on by the City Department of Real Estate, the Corporation Counsel, and the Board of Estimate. Only after all these agencies had approved would the request for funding have been made by the City to HUD. There were no existing committed federal funds for the purpose.

We would have to strain to find a Congressional intention to include Morales as a federal "public official" in these circumstances.

We think, moreover, that Congress, by a process of exclusion, has shown a contrary intention with respect to persons like

Morales. A broader look at the bribery and related statutes shows this.

18 U.S.C. § 203 includes within the prohibitions against bribery "a special Government employee" -- essentially, as defined in Section 202, a short-term employee.

When the Public Health Service Statute was enacted, it subjected to the provisions of 18 U.S.C. § 203 "any State officer or employee who is assigned to the Department (HEW) without appointment." 42 U.S.C. § 246(7)(A). Thus, even when there was an actual interchange of personnel with the states as provided in 42 U.S.C. § 246 (f)(1) et seq., Congress thought it necessary to make the state employee subject to the bribery statutes by special reference -- an unnecessary reference if he would be broadly read to be "acting for or on behalf of the United States" under 18 U.S.C. § 201 or § 203 in any case.

Indeed, in 1971, in formulating the Government Organization Statute, Congress specifically provided, 5 U.S.C. § 3374, for every "executive agency", in which HUD is included, that "(a) an employee of a state or local government who is assigned to an executive agency under an arrangement under this subchapter . . . (c) during the period of assignment, a state or local government employee on detail to an executive agency . . . (2) is deemed an employee of the agency for the purpose of . . . sections 203, 205, 207, 208, 209, 602, 603, 606, 607, 643, 654, 1905 and 1913 of Title 18. . . ." (Emphasis added). 3/

If Section 201 is given the broad reading of the court below, there is no need

for the earlier Public Health or later Government Organization statutes. Whether we consider the statutory treatment as an expression of contrary Congressional intent, however, or as simply a contribution to the ambiguity of Section 201, we hold that, in the circumstances of this case, Morales was not a federal "public official" and that it was reversible error to permit the jury to find that he was.

We note in passing that we reject appellants' alternative theories that even if Morales was a federal "public official" his mere recommendation would not be sufficient to constitute an "official act." See United States v. Carson, 406 F.2d 424, 433 (2 Cir. 1973); as well as their contention that because, at least with respect to Count 3, Morales was an undisclosed undercover agent, his status negated the concept of bribery. See United States v. Rosner, 485 F.2d 1213, 1228-29 (2 Cir. 1973), cert. denied, 417 U.S. 950 (1974).

II

When we turn to the convictions on the conspiracy count we are not under the constraint of interpreting a particular substantive statute. The conspiracy charged here was within the federal criminal jurisdiction. The indictment alleged, inter alia, that the defendants conspired "to defraud the United States and its departments and agencies in connection with the performance of its lawful governmental functions by obstructing and hindering the United States Department of Housing and Urban Development in the impartial, fair and honest distribution of federal funds and by depriving the United

States of the faithful and honest services of employees of the New York City Model Cities Administration which was, at all times relevant to this indictment, funded and supervised in substantial part by the United States Department of Housing and Urban Development."

The essence of the conspiracy was the corrupt agreement to defraud the United States in the performance of its lawful governmental functions. On this charge there is no need to find Morales a federal public official. And Judge Knapp correctly explained that to the jury. [4] Here the conspiracy might never achieve its objective, but that would not be a determining factor. An agreement that might defraud the federal government in its functions at some time in the future, followed by an overt act, makes out the conspiracy charged. It is not necessary that the agreement be to defraud the Government out of money, Haas v. Henkel, 216 U.S. 462 (1910); United States v. Jacobs, 475 F.2d 270 (2 Cir.), cert. denied sub nom. LaVelle v. United States, 414 U.S. 821 (1973), but only to impede its lawful functions.

While some of the conspiracy cases cited by the Government are easier than this case because federal money had actually been set aside, Harney v. United States, 306 F.2d 523, 531 (1 Cir. 1962) or applied for, United States v. Thompson, 366 F.2d 167 (6 Cir. 1966), we do not think the difference to be substantial. The conception that a criminal conspiracy has been formed is less restrictive than whether an "attempt" has gone far enough to make the act charged a criminal act.

III

Kaufman contends that his conviction on the perjury counts (false declaration) under 18 U.S.C. § 1623 is legally deficient in two respects. He contends first that the prosecutor should never have taken him before the Grand Jury knowing that he was a potential defendant without revealing in advance that Morales had secretly taped conversations with him at the instance of the government. Kaufman contends, moreover, that the government failed to live up to its obligations by not informing the Grand Jury that he had recanted, before permitting the Grand Jury to indict him for making false declarations.

Kaufman cites no authority in support of the first proposition. His argument is that the prosecution is under a duty to inform a prospective defendant that there are recordings of his own criminal conduct, distinguishing cases where the testimony of other wit nesses was not disclosed. United States v. Winter, 348 F.2d 204, 210 (2 Cir.) cert. denied, 382 U.S. 955 (1965). Judge Weinfeld's discussion in Winter, speaking for this court, lays the point to rest. There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth. Though Kaufman was not in custody, he was given the Miranda warnings.

We do not condone the use of the Grand Jury for the sole purpose of preparing

an already pending indictment for trial, see United States v. Dardi, 330 F.2d 316, 336 (2 Cir. 1964), and there may be situations in which no indictment has yet been filed where this stricture would apply. In this case, however, there was a continuing investigation into possible corrupt practices of Model Cities personnel and some who dealt with them. Kaufman could have been a valuable witness for the Government, see United States v. Sweig, 441 F.2d 114, 121 (2 Cir.), cert. denied, 403 U.S. 932 (1971), as indeed he tried to be in his period of cooperation after his perjury.

The second contention concerning his alleged recantation is also without merit.

In 1970, Congress in enacting the Organized Crime Control Act included a section relating to false declarations before a grand jury or court, Pub. L. 91-452, Title IV ¶ 401a, 84 Stat. 932. That section, 18 U.S.C. § 1623, addressed itself to the problems of recantation. Congress provided:

> "Where, in the same continuous court or grand jury proceeding in which declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." 18 U.S.C. § 1623(d). [5]

The purpose was obviously to induce the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution for doing so. 2 U.S. Code Cong. & Adm. News p. 4024 (1970). 6/

Kaufman appeared before the Grand Jury on February 2, 1973. He was advised of his privilege against self-incrimination and that he was a target of the Grand Jury investigation. After he gave what the Assistant United States Attorney believed to be perjurious testimony, he was warned that he might be subject to a perjury prosecution, and asked whether "in light of that warning" he wished to change his testimony. Kaufman said no. When the Assistant conspicuously put some boxes of tape recordings on the table, Kaufman said he would like to change his testimony and admitted that Morales had asked him for money. He continued to deny, however, that he had offered Morales $15,000, that he had paid Morales $500 and that he had discussed the matter with Del Toro. These denials, among others, were the basis for the false declaration counts on which Kaufman was convicted in Counts 12, 13 and 16. 7/

After this first Grand Jury session, Kaufman went to the office of the United States Attorney where he talked with several assistants, recanting some of the perjury that day, and the balance on February 6, 1973 after consulting counsel. Having agreed to become a cooperating witness for the Government and himself to wear a tape recorder in further pursuit of crime, he later balked at wearing a tape recorder in a proposed conversation

with the president of the company which owned the Ludwig-Baumann building on the obviously silly excuse that the latter was an honest person who knew nothing of Kaufman's illicit relation with Morales.[8/]

Kaufman argues that the failure of the prosecutor to tell the Grand Jury that he had confessed to the substantive crime and conspiracy -- for that is what his "recantation" meant -- bars his prosecution for perjury.

Kaufman appeared before the Grand Jury three times after the purported recantation in the United States Attorney's office. On apparent advice of counsel he made no effort himself to recant before the Grand Jury. We need not decide whether Kaufman still had a chance to recant his perjury or whether his perjury had by then been made manifest, for he failed to use his own opportunity to recant before the Grand Jury in any event.

In fact, his "recantation," made in piecemeal fashion, was part of a plea bargaining process which could not have taken place before the Grand Jury, and which was hardly the type of recantation considered by Congress in enacting the section.

Kaufman makes the additional argument that the prosecutor unfairly cut off his recantation "right" by making his perjury "manifest" as soon as he left the Grand Jury for the first time. However, the prosecutor's placing of boxes of tape recordings on the table in the Grand Jury room should have indicated that the time for recantation had come, or at least, did not have long to run. Kaufman thereupon

simply made one grudging admission, but he failed to recant his denial that he had bribed and agreed to bribe Morales. Moreover, as indicated, Kaufman later appeared before the Grand Jury again but made no effort to tell it the truth. Under the circumstances, the claim that his "right" to recantation was unfairly cut off is without merit.

There was no need to warn appellant of his "right" to recant, as we have recently held. United States v. Cuevas, ___F.2d___, slip op. 1719, No. 577, Sept. Term 1974 (Decided Feb. 10, 1975); United States v. Lardieri, 497 F.2d 317, 321 (3 Cir. 1974), on rehearing, remand witdrawn and judgment affirmed, ___F.2d___ (3 Cir. Dec. 18, 1974) slip op. No. 73-1750.[9]

Nor was there any need, as appellant contends, for the prosecutor to notify the Grand Jury of his "cooperation." He quotes from the Commentary on the Standards Relating to the Prosecution Function (1971) that "a prosecutor should prsent to the grand jury evidence which would reasonably tend to negate the guilt of the accused. . . ."

A guilty person who "cooperates" does not negate his guilt thereby. It is commonplace that punishment is for the court, not the jury, grand or petit.

IV

Del Toro contends that the use of Kaufman's Grand Jury testimony violated the rule of Bruton v. United States, 391 U.S. 123 (1968), since Kaufman did not testify. Though appellant argues that "the

recantation involving Del Toro" was read to the jury, no transcript reference is given, nor could any be found. In the Grand Jury testimony of Kaufman there is no inculpatory statement regarding Del Toro. Hence Bruton is not applicable. United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1058 (2 Cir. 1970); United States v. Deutsch, 451 F.2d 98, 116 (2 Cir. 1971), cert. denied, 404 U.S. 1019 (1972); United States v. Trapiano, 418 F.2d 1069, 1080-81 (2 Cir. 1969), cert. denied, 397 U.S. 1021 (1970).

We have examined the other claims of error and found them without merit. [10]

The conviction on counts 2 and 3 is reversed, as to both appellants. The conviction on the other counts is affirmed as to both appellants. [11]

F I L E D
February 27, 1975
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

F O O T N O T E S

1. Ruocco pleaded guilty to the conspiracy count and testified for the government.

2. Section 201(c)(1) correlatively subjects to fine and imprisonment the "public official" who corruptly receives or agrees to receive anything of value in return for being influenced in his performance of any official act.

It is also a crime under 18 U.S.C. § 201(b)(2) for the briber to make the gift or promise to the public official to influence him to commit or aid in committing or collude in or allow, any fraud, or make opportunity for the commission of any fraud on the United States. There is a correlative provision in 201(c)(2). The case was tried on the theory only of "official act" under subsection (1) and the court charged only "official act." In any event, under either subsection it would be necessary to find that the person bribed was a "public official."

3. Significantly, in prohibiting political activity by state and local employees there is no requirement that the local employee be "assigned" to the federal agency. In the context of prohibition of political activity, as distinguished from bribery, the definition is broad. A "'state or local officer or employee' means an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency . . . ." 5 U.S.C. § 1501.

4. The court charged that "in the conspiracy count all you must find in this regard is that the object of the conspiracy was to some extent to subvert the Model Cities program, and hence the objectives of the United States, by depriving Model Cities, and hence the United States, of Mr. Morales' unprejudiced judgment regardless of whether he technically fitted the definition of public official as I have defined that term to you."

5. The Supreme Court in United States v. Norris, 300 U.S. 564 (1937), had held that "the telling of a deliberate lie by a witness completes the crime defined by law." (§ 125 of the U.S. Criminal Code; R.S. 5392; 18 U.S.C. § 231), and that a prompt recantation does not excuse the perjury though it may demonstrate that there was no wilful intent to swear falsely. 300 U.S. at 576.

In People v. Ezaugi, 2 N.Y.2d 439 (1957), the Court of Appeals put a severe limitation on the famous rule of People v. Gillette, 126 App. Div. 665 (1908), holding that the Gillette rule applied only "when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities." 2 N.Y.2d at 443. This made the New York recantation rule stricter than Gillette, but more liberal than the federal rule of Norris. The rule of Ezaugi was codified in 1967 to provide that in any prosecution for perjury, it is an affirmative defense that the defendant had retracted his false statement in the course of the proceeding in which it was made . . . . before it became manifest that its falsity was or would be exposed." N.Y.L.

1965, c. 1030, Penal Law § 210.25.

Section 1623(d) was adapted in modified form from the New York Penal Code, Section 210.25. See 2 U.S. Code Cong. & Adm. News, 1970, pp. 4023-24; Hearing and Reports of the Committee on the Judiciary, S. 30 (1969). The New York Statute codified the ruling in People v. Ezaugi, supra. In the New York statute the retraction is made an "affirmative defense."

6. Section 1621, the general perjury statute, has no recantation provision.

7. Counts 11, 14 and 15, based on Kaufman's initial denials of having any knowledge of corruption in Model Cities and of having been asked for or having discussed money with Morales, were dismissed prior to trial with the Government's consent, in view of Kaufman's recantation and admission during his Grand Jury appearance that he had in fact been asked for money by Morales.

8. The real basis for the breakdown of further cooperation was presumably the Government's refusal to grant Kaufman immunity in return for his cooperation.

9. In view of our conclusion there is no need to consider whether the point is waived by failure to move prior to trial. See United States v. Kahn, supra, 472 F.2d at 283 n.9.

10. Del Toro's claim of entrapment is vrivolous. The initial meeting between Kaufman and Morales was arranged by Del Toro and he was told by Kaufman to

carry the message to Morales that Kaufman would split $50,000 less taxes with Morales in exchange for the lease. All this occurred before September 1, 1972, the time when Morales was arrested and began to act as a government undercover agent.

11. We have noted Kaufman's argument that there is a serious disparity in sentences on convictions from Model Cities corruption, with Kaufman's sentence by far the most severe. We do not exercise appellate review on the sentencing judge's discretion, but we call t he judge's attention, not only to the reversal of the substantive counts, but also to the disparity, for his consideration if a Rule 35 motion is made.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	7
Conclusion	20

CITATIONS

Cases:

Bronston v. *United States*, 409 U.S. 352	20
Bruton v. *United States*, 391 U.S. 123	15, 16
Carroll v. *United States*, 16 F. 2d 951, certiorari denied, 273 U.S. 763	10–11
Dennis v. *United States*, 384 U.S. 855	9
Haas v. *Henkel*, 216 U.S. 462	9
Hammerschmidt v. *United States*, 265 U.S. 182	9
Harney v. *United States*, 306 F. 2d 523, certiorari denied, 371 U.S. 911	9–10
Hyde v. *Shine*, 199 U.S. 62	9
Keane v. *United States*, 272 Fed. 577	10
People v. *Ashby*, 17 Misc. 2d 413, 184 N.Y.S. 2d 284	14
People v. *Ezaugi*, 2 N.Y. 2d 439, 161 N.Y.S. 2d 75, 141 N.E. 2d 580	14
Rewis v. *United States*, 401 U.S. 808	10
Sherman v. *United States*, 356 U.S. 369	17
Sorrells v. *United States*, 287 U.S. 435	17
United States v. *Crandall*, 363 F. Supp. 648, affirmed, 493 F. 2d 1401, 495 F. 2d 1369, certiorari denied, 419 U.S. 852	15
United States v. *Crimmins*, 123 F. 2d 271	11
United States v. *Cuevas*, 510 F. 2d 848	13
United States v. *DeSapio*, 435 F. 2d 272, certiorari denied, 402 U.S. 999	16
United States v. *Deutsch*, 451 F. 2d 98, certiorari denied, 404 U.S. 1019	16

588-895—75——1

Mr. Justice Marshall extended the time for filing the petitions for a writ of certiorari to and including April 28, 1975. The petition in No. 74–1351 (Del Toro) was filed on April 26, 1975; and the petition in No. 74–1353 (Kaufman) was filed on April 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for perjury and conspiracy to defraud the United States are defective because their convictions for bribery were reversed.

2. Whether in order to find petitioners guilty of the conspiracy charged in the indictment the government was required to prove that petitioners acted with an "anti-federal" intent.

3. Whether a person may be convicted of perjury under 18 U.S.C. 1623 on the basis of materially false statements made to a federal grand jury if such person (a) was not informed prior to his first appearance before the grand jury that the government had evidence of certain prior statements made by such person and (b) was not informed until after his first appearance that a grand jury witness may under certain circumstances effectively recant false grand jury testimony, and (c) if the grand jury was not informed that such person had admitted during plea negotiations with an Assistant United States Attorney that he had testified falsely before the grand jury.

4. Whether portions of certain grand jury testimony were introduced at trial in violation of the petitioner Del Toro's right of confrontation.

5. Whether petitioner Del Toro was entrapped as a matter of law.

6. Whether the trial court's review of the evidence and its instructions concerning the perjury charges were proper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; bribery of a public official, in violation of 18 U.S.C. 201(b); and making false statements before a federal grand jury, in violation of 18 U.S.C. 1623.[2] Petitioner Kaufman was sentenced to concurrent terms of four years' imprisonment. Petitioner Del Toro was sentenced to imprisonment for concurrent terms of one year and one day. The court of appeals reversed the bribery convictions on the ground that the person bribed was not a "public official," as that term is defined in 18 U.S.C. 201(a). It affirmed the convictions on all other counts (Pet. App. A–1 to A–20).

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[2] The jury found petitioner Kaufman guilty on three counts of perjury, three other counts having been dismissed on the ground that Kaufman had subsequently recanted the false testimony forming the basis of those counts. See 18 U.S.C. 1623(d). The jury found petitioner Del Toro guilty on five counts of perjury; he was acquitted on a sixth count of perjury, and a seventh count had been dismissed at the close of all the evidence (Pet. App. A–3).

The evidence introduced at trial is set forth in detail in the court of appeals' opinion (Pet. App. A–3 to A–8). Briefly, the evidence showed that at all times relevant to the conspiracy charged in the indictment, Pedro Morales served as Assistant Administrator of the Harlem-East Harlem Model Cities Program in New York City, a program funded and supervised by the United States Department of Housing and Urban Development (HUD).[3] Sometime in late August 1972, petitioner Kaufman, an attorney and real-estate broker, was introduced to Morales by petitioner Del Toro for the purpose of discussing the possibility of Morales' leasing, on behalf of the Harlem-East Harlem Model Cities Program, office space in a building for which Kaufman was the rental agent. (Del Toro was the Executive Director of an East Harlem anti-poverty agency.) At one point during the meeting, Morales told Kaufman that before leasing the building Kaufman would have to pay him a bribe. Kaufman stated that he had been aware of that possibility and that he would think it over.

On September 1, 1972, Morales was arrested on charges arising out of transactions unrelated to this case. Morales confessed to the role he had played in those transactions, and he agreed generally to assist in an undercover capacity in a joint federal-city investigation into official corruption in the Model Cities Program. Morales subsequently aided investi-

[3] The undisputed evidence at trial showed that 80 percent of the salaries of Model Cities personnel and 100 percent of the other expenses incurred in the operation of Model Cities programs are paid with federal funds (Pet. App. A–9 to A–10).

gators by tape-recording conversations with various individuals having dealings with him in his capacity as a Model Cities administrator. Several of those conversations involved petitioners Del Toro and Kaufman, and the tape recordings revealed that Kaufman agreed to pay Morales $15,000 if Morales leased the building for which Kaufman was the rental agent, that the $15,000 payment was to be disguised as part of the commission paid to Kaufman by the owners of the building, that a commission agreement was actually negotiated that included inflated percentage payments to Kaufman, and that Kaufman paid Morales $500 in cash to bind their agreement.

On February 2, 1973, Kaufman was called before a federal grand jury investigating official corruption in the Model Cities Program. Before testifying, he was advised of his rights and of the fact that he was a target of the grand jury's investigation. After having denied complicity in any corrupt activities, Kaufman was shown boxes containing the tape recordings that had been made by Morales. The Assistant United States Attorney then reminded Kaufman that he was testifying under oath and that he was subject to prosecution for perjury should he be lying. He also asked Kaufman if he wished to change any of his prior testimony, but Kaufman declined to do so. Kaufman did admit subsequently, however, that Morales had asked him for money—but he insisted that he had neither offered nor paid Morales a bribe.

Shortly after his initial appearance before the grand jury, Kaufman met with the Assistant United States Attorney outside the grand jury's presence.

The prosecutor again advised Kaufman of his constitutional rights, and also read relevant portions of the perjury statute (18 U.S.C. 1623) to him, pointing out specifically that the statute permits a witness to recant false grand jury testimony under some circumstances but that recantation is not effective once the fact of perjury has become "manifest." The prosecutor then told Kaufman that tapes existed of certain of his conversations with Morales, whereupon Kaufman admitted having offered to bribe Morales but continued to deny that he had actually paid Morales $500 as a down-payment on the bribe. Kaufman subsequently offered to cooperate with the government in return for complete immunity from prosecution, and he did in fact cooperate until it had become apparent to him that the government was not prepared to grant him full immunity from prosecution in exchange for his cooperation. At no point during his two appearances before the grand jury, following his initial appearance, did he make an effort to correct his prior false testimony.

On February 16, 1973, petitioner Del Toro was called before the grand jury and, prior to testifying, was also informed of his rights and of the fact that he was a target of the grand jury's investigation. Del Toro testified that he knew that arrangements had been made for Kaufman to receive a brokerage fee in connection with the lease by Morales of office space on behalf of the Harlem-East Harlem Model Cities Program. He also testified that he was aware that payoffs were not uncommon among public officials. He denied knowing of any offer of a bribe or payment to

Morales, however, or of having participated in any way in any such transaction. In a subsequent appearance before the grand jury, Del Toro declined to change his earlier testimony although he did admit that he had introduced Kaufman and Morales and that he had been present at their first meeting. He maintained, however, that he had been in a different part of the room when Kaufman and Morales had discussed the possibility of Morales' leasing office space in the building for which Kaufman was the rental agent.

ARGUMENT

Two points about this case are clear beyond doubt: both petitioners repeatedly lied under oath before a federal grand jury and both participated in a scheme to bribe an official of a Model Cities Program. Pressing various contentions, all of which were considered and rejected by Judge Gurfein in his opinion for himself and Judges Friendly and Feinberg, petitioners now seek to have this Court upset their convictions. We will deal below with each of the issues petitioners have raised, but it is significant that in regard to not a single one of those issues does there exist a conflict among the circuits and, indeed, petitioners do not allege otherwise. In these circumstances, there is nothing in this case that would make it worthy of further review by this Court.

1. Both petitioners contend (Kaufman Pet. 13–23; Del Toro Pet. 4–6) that because their bribery convictions were reversed their convictions for conspiracy to defraud the United States must also be reversed. In

588-895—75——2

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588-895—75——2

addition, petitioner Del Toro argues (Pet. 4–6) that reversal of the bribery count requires the reversal of his perjury convictions.

(a). Petitioners were charged and convicted of bribery under 18 U.S.C. 201(b), which proscribes the giving or promising of anything of value to any "public official" with the intent to influence an official act.[4] The court of appeals reversed petitioners' conviction for bribery, holding that Pedro Morales was not a federal "public official," as that term is defined in 18 U.S.C. 201(a). The court's decision in this regard was thus based on statutory interpretation and even if it was correct (but see *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537), it does not follow that petitioners' conspiracy and perjury convictions must also be reversed.

The conspiracy statute that petitioners were convicted of having violated (18 U.S.C. 371) prohibits two or more [illegible] from conspiring "*either* to commit any off[illegible]gainst the United States, *or* to defraud the United States, or any agency thereof in any manner or for any purpose * * *" (emphasis added). Under Section 371, there was no need to find that Morales was a federal "public official." The federal government financed 100 percent of the cost of the Harlem-East Harlem Model Cities Program and 80

[4] The term "public official" is defined in pertinent part in Section 201(a) as an "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, * * * in any official function, under or by authority of any such department, agency, or branch of Government * * *."

percent of its salaries, and supervised its activities in part. The concern of the United States that the program be free of corruption, through conspiracies such as that entered into by petitioners, was therefore scarcely "indirect and insignificant" as petitioner Kaufman alleges (Pet. 23).[5] See the opinion below (Pet. App. A–14).

It is well settled, moreover, that in regard to a charge of illegally conspiring to defraud the United States, within the meaning of 18 U.S.C. 371, it is irrelevant that the means chosen may not themselves have violated a federal criminal statute or that overtures were not made directly to an employee of the federal government. See *Haas* v. *Henkel,* 216 U.S. 462, 479–480; *Dennis* v. *United States,* 384 U.S. 855, 860–861. See also *Hammerschmidt* v. *United States,* 265 U.S. 182, 188; *United States* v. *Keitel,* 211 U.S. 370, 394; *Hyde* v. *Shine,* 199 U.S. 62, 81; see also *United States* v. *Johnson,* 383 U.S. 169, 173; *United States* v. *Thompson,* 366 F. 2d 167, 169–173 (C.A. 6), certiorari denied *sub nom. Campbell* v. *United States,* 385 U.S. 973; *Harney* v. *United States,*

[5] The conspiracy count of the indictment charged petitioners with having conspired "to defraud the United States and its departments and agencies in connection with the performance of its lawful governmental functions by obstructing and hindering the United States Department of Housing and Urban Development in the impartial, fair and honest distribution of federal funds and by depriving the United States of the faithful and honest services of employees of the New York City Model Cities Administration which was, at all times relevant to this indictment, funded and supervised in substantial part by the United States Department of Housing and Urban Development" (Pet. App. A–13 to A–14).

306 F. 2d 523, 526–527 (C.A. 1), certiorari denied, 371 U.S. 911.[6]

(b). There is nothing to petitioner Del Toro's contention (Pet. 4–6) that his perjury convictions must be reversed because the reversal of his conviction for bribery rendered his false statements immaterial. The grand jury before which Del Toro appeared was engaged in a "continuing investigation into possible corrupt practices of Model Cities personnel and some who dealt with them" (Pet. App. A–16). Both petitioners materially misrepresented during their appearances before the grand jury their respective roles in precisely the type of conspiracy properly the focus of the grand jury's investigation. Those deliberate lies under oath certainly "ha[d] a natural * * * tendency to influence, impede or dissuade the grand jury from pursuing its investigation" and therefore were material. *Carroll* v. *United*

[6] Petitioner Del Toro cites no contrary authority to support his contention that a conspiracy to defraud the United States, under 18 U.S.C. 371, was not established since the means used to further the conspiracy (that is, the bribery of Pedro Morales) did not violate a federal criminal statute. Petitioner Kaufman cites two cases in support of the contention—*Rewis* v. *United States*, 401 U.S. 808, and *Keane* v. *United States*, 272 Fed. 577 (C.A. 4). Neither case is apposite: this Court's decision in *Rewis* turned on the language used by Congress in the Travel Act, 18 U.S.C. 1952, and did not involve the conspiracy statute under which petitioners were charged; *Keane* involved a conspiracy to defraud a military post exchange that was not within the purview of 18 U.S.C. 371, under which petitioners were charged, since the exchange had not been authorized by Congress, Congress had not appropriated any funds to operate the exchange and the federal government was not responsible for either the contents of the exchange or any obligations incurred in the exchange's operation.

States, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; see also *United States* v. *Koonce,* 485 F. 2d 374, 380–381 (C.A. 8); *United States* v. *Mancuso,* 485 F. 2d 275, 280–282 (C.A. 2).

2. Petitioner Kaufman also argues (Pet. 23–27) that the jury was not adequately instructed that in order to find petitioners guilty of the conspiracy charged in the indictment the government was required to prove that petitioners were aware that the federal government was substantially involved in the operation of the Model Cities Program. Kaufman did not object to the court's instructions to the jury, and he is precluded from doing so now. Rule 30, Fed. R. Crim. P. In any event, Kaufman's contention that the court's careful instruction (see Tr. 1514–1523) was inadequate because it did not require the jury to find that petitioners had acted with an "anti-federal intent" rests entirely on the rule in *United States* v. *Crimmins,* 123 F. 2d 271 (C.A. 2), which this Court recently rejected in *United States* v. *Feola,* No. 73–1123 (decided March 19, 1975).

3. Petitioner Kaufman contends (Pet. 27–41) that his perjury convictions must be reversed because (a) he was not informed prior to his first appearance before the grand jury that the government had evidence of certain prior statements made by him, (b) he was not informed until after his first appearance that a grand jury witness may under certain circumstances effectively recant false grand jury testimony, and (c) the grand jury was not informed before indicting him for perjury that he had ad-

mitted during plea negotiations with an Assistant United States Attorney that he had testified falsely before the grand jury.

(a). As noted earlier, before Kaufman began testifying before the grand jury he was advised of his rights and of the fact that he was a target of the grand jury's investigation. In the process of taking his oath, he was also advised that he had a duty to testify truthfully. After he had begun testifying, moreover, the Assistant United States Attorney repeated the latter admonition and informed him that he was subject to prosecution for perjury should it be discovered that he was not testifying truthfully. Kaufman's contention (Pet. 28–31) that the government had an additional responsibility to inform him that it had evidence of his involvement in the conspiracy and bribery under investigation is without merit. As the court below correctly stated (Pet. App. A–15):

> There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth. * * *

Accord: *United States* v. *Winter,* 348 F. 2d 204, 210 (C.A. 2), certiorari denied, 382 U.S. 955.

(b). Neither did the government have a duty to inform Kaufman during his initial appearance before the grand jury that a witness may under certain cir-

cumstances effectively "recant" false grand jury testimony,[7] which is to say that he may lie with impunity so long as he subsequently admits he has done so. Again, petitioner had been sworn and had been repeatedly reminded by the Assistant United States Attorney of his obligation to testify truthfully. Nothing more was required. As the court stated in *United States* v. *Lardieri,* 506 F. 2d 319, 323 (C.A. 3) (on rehearing):

> [D]ismissing perjury indictments where the prosecutor has not given such notice would create a new impediment to successful perjury prosecutions, thereby jeopardizing the deterrent effect Congress specifically sought to establish by rendering perjury convictions easier to obtain. The statutory history, therefore, does not reveal a Congressional intent that prosecutions be dismissed where such warnings are not given.

Accord: *United States* v. *Cuevas,* 510 F. 2d 848, 851–852 (C.A. 2); *United States* v. *Gill,* 490 F. 2d 233, 240–241 (C.A. 7).

(c). Petitioner Kaufman further contends (Pet. 31–37) that the government had an obligation to inform the grand jury that Kaufman had admitted to

[7] Petitioners were charged and convicted under 18 U.S.C. 1623, which provides for the recantation of false testimony as follows: "Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

an Assistant United States Attorney, following his first appearance before the grand jury, that some of his grand jury testimony had been false. This is a rather remarkable assertion. It amounts to a claim that petitioner could not be prosecuted for perjury because the prosecutor did not inform the grand jury that petitioner had admitted committing perjury when he testified.

In any event, petitioner Kaufman's admission that he had lied under oath occurred outside the presence of the grand jury and was not therefore an effective recantation under 18 U.S.C. 1623(d). *United States* v. *Krogh*, 366 F. Supp. 1255, 1256 (D. D.C.).[8]

Moreover, following his initial appearance before the grand jury, Kaufman was informed of the recantation provision in 18 U.S.C. 1623 (Kaufman Pet. 11). But during his subsequent appearances he made no effort to take advantage of any opportunity he may have had to correct his earlier testimony,[9] appar-

[8] 18 U.S.C. 1623(d) was adopted by Congress in modified form from the New York Penal Code, § 210.25 (McKinney, 1967), and was enacted as part of Title IV of the Organized Crime Control Act of 1970, 84 Stat. 932. Under New York law, an effective recantation cannot occur outside the presence of the grand jury. *People* v. *Ezaugi*, 2 N.Y. 2d 439, 161 N.Y.S. 2d 75, 141 N.E. 2d 580; *People* v. *Ashby*, 17 Misc. 2d 413, 184 N.Y.S. 2d 284 (Sup. Ct.).

[9] Since Kaufman did not effectively recant his false grand jury testimony, there is no need to consider here whether by the time he admitted to the Assistant United States Attorney that he had testified falsely it had become "manifest" that "such falsity [had] been or [would] be exposed" or whether his false statements had "substantially affected" the grand jury's inquiry. In either event, recantation would not then have been permitted under 18 U.S.C. 1623(d). The court of appeals did note in this

ently, as the court of appeals found (Pet. App. A–18), on advice of counsel after his plea negotiations with the prosecutors had broken down and his brief period of cooperation with the government had come to an end. (Nothing in the record supports Kaufman's suggestion that he did not disclose to the grand jury the extent of his false testimony because he assumed that his admissions to the Assistant United States Attorney constituted an effective recantation under 18 U.S.C. 1623(d).)[10]

4. Petitioner Del Toro contends (Pet. 6–8) that the introduction at trial of portions of Kaufman's grand jury testimony violated the rule announced by this Court in *Bruton* v. *United States,* 391 U.S. 123, since Kaufman did not testify at trial. As the court below held (Pet. App. A–20), the testimony to which Del Toro objects did not contain any inculpatory state-

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regard, however, that (Pet. App. A–19): "[T]he prosecutor's placing of boxes of tape recordings on the table in the Grand Jury room [during Kaufman's initial appearance before the grand jury] should have indicated that the time for recantation had come, or at least, did not have long to run. Kaufman thereupon simply made one grudging admission, but he failed to recant his denial that he had bribed and agreed to bribe Morales. Moreover, as indicated, Kaufman later appeared before the Grand Jury again but made no effort to tell it the truth. * * *"

[10] *United States* v. *Crandall,* 363 F. Supp. 648 (W.D. Pa.), affirmed, 493 F. 2d 1401, 495 F. 2d 1369 (C.A. 3), certiorari denied, 419 U.S. 852, upon which petitioner Kaufman relies in support of his argument that his admissions outside the presence of the grand jury represented an effective recantation (Pet. 34–35, note), is of little assistance to him because in that case the defendant was not recalled before the grand jury and he thus was not given any opportunity to recant.

ments regarding Del Toro[11] and, as a consequence, *Bruton* did not preclude its introduction at trial. *E.g.*, *United States ex rel. Nelson* v. *Follette*, 430 F. 2d 1055, 1058 (C.A. 2); *United States* v. *Deutsch*, 451 F. 2d 98, 116 (C.A. 2), certiorari denied, 404 U.S. 1019.

Moreover, Kaufman's grand jury testimony did not fall within *Bruton* since such testimony was in furtherance of the conspiracy in connection with which both Del Toro and Kaufman were subsequently charged. The trial judge found that Kaufman did not terminate his participation in the conspiracy until after his initial appearance before the grand jury (Tr. 1294–1295). Kaufman's grand jury testimony, given only a few days after delivery of the $500 down-payment on the $15,000 bribe Kaufman had agreed to give to Morales, plainly constituted an effort on Kaufman's part to prevent the government from halting the conspiracy before it had reached fruition.[12] See, *e.g.*, *United States* v. *Frank*, 494 F. 2d 145, 155–156 (C.A. 2); *United States* v. *DeSapio*, 435 F. 2d 272, 283–284 (C.A. 2), certiorari denied, 402 U.S. 999.

5. Petitioner Del Toro's contention (Pet. 8–10) that he was entrapped as a matter of law is, as

[11] Indeed, one of the perjury counts on which petitioner Kaufman was convicted charged him with having falsely stated to the grand jury that he had not discussed the making of a bribe with either Morales or Del Toro.

[12] The indictment charged a conspiracy that began on August 1, 1972, and continued until the indictment was filed. The conspiracy count charged overt acts as late as February 14, 1973. The trial judge found that Kaufman's grand jury testimony of February 2, 1973, was in furtherance of the conspiracy (Tr. 1294–1295).

the court of appeals stated, "frivolous" (Pet. App. A–20, n. 10):

> The initial meeting between Kaufman and Morales was arranged by Del Toro and he [Del Toro] was told by Kaufman to carry the message to Morales that Kaufman would split $50,000 less taxes with Morales in exchange for the lease. All this occurred before September 1, 1972, the time when Morales was arrested and began to act as a government undercover agent.

Neither did entrapment occur with regard to the perjury charges against Del Toro. The fact that the government had tape recordings of statements that Del Toro denied having made during his testimony before the grand jury hardly amounts to the government's implanting or promoting a criminal design in the mind of an innocent person. See *United States* v. *Russell*, 411 U.S. 423; *Sherman* v. *United States*, 356 U.S. 369; *Sorrells* v. *United States*, 287 U.S. 435.

6. Finally, petitioner Del Toro contends (Pet. 11–12) (a) that the trial court's review of the evidence was imbalanced and (b) that its instructions to the jury concerning the perjury charges were improper because they indicated that ambiguous or even true answers could form the basis for a perjury conviction. Del Toro did not object at trial to the court's charge to the jury, however, and he is therefore precluded from doing so now. Rule 30, Fed. R. Crim. P. In any event, both contentions are unsupported by the record.

(a). The trial transcript reveals that the trial judge was extraordinarily sensitive to the need to maintain

a completely fair and impartial attitude and to refrain from imposing his view of the facts on the jury. The trial judge cautioned the jury at length, for example, that it alone was the judge of the facts and that it should not rely upon what it might perceive as his own reactions to the evidence (Tr. 1499–1500). To the extent that he did summarize the contentions of the prosecution and the defense, the judge accorded petitioner Del Toro's contentions far more than "casual mention" (Del Toro Pet. 11). Indeed, in "selecting that evidence which would most likely aid the jury in putting the case in perspective," *United States* v. *Light*, 394 F. 2d 908, 911 (C.A. 2), the trial judge chose to discuss "the arguments advanced by and on behalf of Del Toro" to illustrate his instructions on the law of conspiracy (Tr. 1517–1519). In that connection, and contrary to petitioner Del Toro's assertion (Pet. 12), the court did *not* assume that the initial meeting between Morales, Del Toro and Kaufman occurred in August, 1972, as contended by the government, but expressly informed the jury that "Del Toro places it between December '71 and February '72" (Tr. 1517). Moreover, the trial judge emphasized Del Toro's claim "that all he intended to do was get Morales off his back and that he never did or intended to do any of the things he told Morales about" (Tr. 1518).[13] By comparison, the court merely

[13] Petitioner Del Toro's suggestion (Pet. 12) that the trial judge entertained doubts about the sufficiency of the evidence of his guilt fails to take account of the judge's statement, made in ruling on defense motions at the end of the case, that, having heard Del Toro testify on his own behalf, "whatever effect it may have on the jury, it has satisfied me that he was, in fact, involved in the conspiracy with Mr. Kaufman * * *" (Tr. 1293).

stated that it was the government's position that petitioner "knowingly acted as intermediary in the negotiations" between Kaufman and Morales (Tr. 1518). Thus, the court's marshalling of the evidence was fair.

(b). Petitioner Del Toro's contention (Pet. 10–11) that the trial judge's instructions to the jury concerning the perjury charges were improper because they indicated that ambiguous or even true answers could form the basis for a perjury conviction is flatly contradicted by the record. At no time did the trial judge erroneously inform the jury that an ambiguous or true answer might support a perjury conviction; rather, he correctly charged that any given perjury count might properly include ambiguous, or even true, answers but that perjury might nevertheless be made out so long as the overall purpose was to deceive and at least one answer contained in the count was in fact false.[14] By imposing upon the government the obligation of establishing general deception in addition to actual and specific falsity, this instruc-

[14] The trial judge instructed the jury concerning the perjury counts in pertinent part as follows (Tr. 1529–1530):

"What you should do is to take each count and ask yourselves two basic questions with respect to them. First, was the overall purpose of the witness to mislead the Grand Jury by the answers given in that count, was that the overall purpose of the witness? If not, if the answer to that is no, that's the end of the matter. If so, are there one or more answers in that count that are both false and were known to the witness to have been false at the time he gave such answers? If you are satisfied beyond a reasonable doubt as to both those propositions you should convict on such count. If you have a reasonable doubt on either, you must acquit.

"Two things I want to emphasize in this regard: First, all the answers in a particular count need not be false. Some may

tion was in fact more favorable to petitioners than the law required. See *Bronston* v. *United States*, 409 U.S. 352; *United States* v. *Norris*, 300 U.S. 564.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

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be ambiguous or even true. This, the first element, is satisfied if the overall purpose of the testimony set forth in the count was to deceive. However, at least one answer, and you must agree among yourselves as to which one, at least one answer must be actually false. It's no crime, at least not the crime of perjury, to give misleading testimony if each of the individual answers is true. That is another proposition altogether and we are not concerned with it here.

"So let me repeat: The overall purpose of the count must be to deceive and at least one answer must be false and you must agree among yourselves which answer that is."

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